

Before the
COPYRIGHT ROYALTY BOARD
United States Copyright Office
Washington, DC

In re

Distribution of Digital Audio Recording
Royalty Funds

CONSOLIDATED
Docket No. 2008-3 CRB DD
(2007-2011 SRF)

RESPONSE TO DAVID POWELL’S EXHIBITS

Pursuant to the Copyright Royalty Board (“CRB”)’s order dated June 6, 2019, the Alliance of Artists and Recording Companies (“AARC”) hereby files its response to the CRB’s finding on David Powell (“Powell”)’s exhibits. Order Acknowledging Receipt of Responsive Exhibit from David Powell and Authorizing Response (June 6, 2019) (“Finding Order”); see also Motion for Leave to File a Late Petition to Participate SS. 351.1(d) (Apr. 30, 2019) (“Powell Motion”). On June 6, 2019, the CRB issued an order finding that the exhibits submitted by Powell establish that the individual of whom Powell alleges to take care (“Caree”) “was hospitalized for a seizure from January 17-19, 2019.” Finding Order at 1.

As detailed below, Powell’s exhibits do not support the contention that his failure to submit a valid petition by the deadline was due to the “medical needs” of his Caree during the period of December 24, 2018 to February 28, 2019. Powell Motion at 2.

Additionally, accepting Powell’s late petition would prejudice AARC because it would further delay the distribution of the 2007 Sound Recordings Fund/Copyright Owners Subfund (“2007 SRF/CO Subfund”). Powell is the only remaining 2007 claimant, other than AARC, who has filed a petition, in this consolidated proceeding. Accordingly, AARC respectfully requests that Powell’s motion seeking leave to file a late petition be denied. 17 U.S.C. § 803(b)(1)(A)(ii)

(2017); 37 C.F.R. § 351.1(d) (2019); Order Granting AARC’s Motion to Reject David Powell’s Defective Filings and Dismissing David Powell (Feb. 27, 2019) (“Order Dismissing Powell”).

ARGUMENT

Powell’s Exhibits Do Not Support His Contention That There Is Substantial Good Cause

Powell should not be permitted to file a late Petition to Participate because he failed to establish “substantial good cause” by stating “the reason (supported by facts and arguments)” in his motion seeking leave to file. 17 U.S.C. § 803(b)(1)(A)(ii); 37 C.F.R. § 351.1(d); Order Dismissing Powell at 3-4. Specifically, Powell’s exhibits do not support his contention that his Caree was hospitalized throughout the 30-day period for filing his Petition to Participate, and so, do not establish substantial good cause for the CRB to accept a late petition in accordance with Section 351.1(d) of the CRB regulations. 37 C.F.R. § 351.1(d).

Powell alleges that he “is Guardian to a 71 years old woman. She had to be hospitalized for 2 major grand mal seizures. *During the period 24 Dec. 2018-Feb. 28,2019.* Due to her medical needs [he] made several clerical errors[sic].” Powell Motion at 2 (emphasis added). Nonetheless, the CRB, after reviewing all the exhibits submitted by Powell, found that such hospitalization was for three days, “from January 17-19, 2019.” Finding Order at 1.

Therefore, Powell’s exhibits contradicted his allegations.

In its order granting Eugene Curry (“Curry”), another participant in the consolidated proceeding, leave to file a late petition, the CRB recognized that taking care of a loved one who has been undergoing a treatment for a serious medical condition may constitute substantial good cause. See Order Granting Eugene Curry Leave to File Late Petition to Participate at 2 (Apr. 19, 2019). However, unlike Curry who provided an exhibit showing that the individual he allegedly cared for had been ill throughout the entire 30-day period for filing a Petition to Participate,

Powell's exhibit shows that his Caree's hospitalization was for only three days. Order Acknowledging Receipt of Responsive Exhibit from Eugene Curry and Authorizing Response at 1 (Apr. 4, 2019); Finding Order at 1.

Furthermore, although Powell alleges that he was so busy with his caregiver responsibilities during the filing time period, he managed to submit two filings, albeit defective ones, prior to the deadline. Finding Order at 1; Verified Motion Petition to Participate for Dart Partial and Final Distribution, Agreed Yes W/ Settling Parties and Allocation Phase Parties I and II and Added to Settlement List (Dec. 20, 2019) ("Powell First Petition"); Verified Motion Petition to Participate for Dart Partial and Final Distribution, Agreed Yes W/ Settling Parties and Allocation Phase Parties I and II and Added to Settlement List (Jan 24, 2019) ("Powell Second Petition"). Notably, Powell's first defective petition was filed on December 20, 2018, well before the January 17-19, 2019 hospitalization period. Finding Order at 1; Powell First Petition. Therefore, the hospitalization of his Caree cannot excuse Powell's defective filing. Powell refiled the same defective petition on January 24, 2019. Powell Second Petition.

It is also worth noting that Powell has participated in numerous CRB proceedings that require the filing of a Petition to Participate to take part in the proceeding. See Motion to Reject David Powell's Defective Filings at 15-17 (Feb. 6, 2019). Therefore, he should be familiar with the requirements for filing a valid Petition to Participate.

Congress adopted the "substantial good cause" standard with the notion that "a party may have a *valid excuse* for not complying" and so, "late filing of petitions to participate under *limited circumstances*" should be permitted. H.R. Rep. No. 108-408, at 29 (2004) (emphasis added). Additionally, it can be inferred from Congress' inclusion of the "*substantial* good cause" requirement, in contrast to the mere "good cause" standard used in the same section for other

requirements, that Congress intended to set a higher bar for filing late petitions. 17 U.S.C. § 803(b)(1)(A)(ii), (b)(6)(C)(xi) (emphasis added); see also Procedural Regulations for the Copyright Royalty Board, 70 Fed. Reg. 30,901, 30,903 (May 31, 2005) (“Presumably, ‘substantial good cause’ requires a stronger showing than mere ‘good cause’”); see also Russello v. United States, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Powell’s motion was predicated on a baseless excuse that is not supported by his own evidence. Granting his motion would essentially eviscerate the “substantial” good cause requirement and open the flood gates for requests to file late petitions.

Accepting Powell’s Late petition Would Prejudice AARC

Accepting Powell’s late petition would also prejudice AARC because it would further delay distribution of the 2007 SRF/CO Subfund royalties, which has already been unnecessarily delayed by Powell’s failure to *promptly* file his motion seeking leave to file. 17 U.S.C. § 803(b)(1)(A)(ii); 37 C.F.R. § 351.1(d); Order Dismissing Powell at 3. Specifically, if the CRB accepts Powell’s late petition, he will become the only party, other than AARC, in this consolidated proceeding claiming for the 2007 SRF/CO Subfund royalties.

Powell’s defective petitions were rejected by the CRB on February 27, 2019. Order Dismissing Powell. In its order, the CRB clearly directed Powell to “promptly” file a motion seeking leave to file if he wished to participate in this consolidated proceeding. Id. at 3-4. Nonetheless, Powell did not file his motion until two months later, on April 30, 2019. Powell Motion. Had Powell filed his motion promptly, the CRB could have determined his status in this

proceeding before the end of the voluntary negotiation period. This would have provided AARC and Powell the opportunity to commence settlement negotiations during this period.

CONCLUSION

WHEREFORE, in view of the foregoing, AARC respectfully requests that the CRB deny Powell's motion seeking leave to file a late Petition to Participate because he failed to establish "substantial good cause" and accepting his petition would prejudice AARC pursuant to 17 U.S.C. § 803(b)(1)(A)(ii), 37 C.F.R. § 351.1(d) and the CRB order of February 27, 2019.

Respectfully submitted,
On Behalf of AARC

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June 13, 2019

Proof of Delivery

I hereby certify that on Thursday, June 13, 2019 I provided a true and correct copy of the AARC's Response to Powell's Exhibits to the following:

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Signed: /s/ Linda R Bocchi